

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

February 15, 2001 Session

Robin Stewart v. Keith D. Stewart

Appeal from the Circuit Court for Knox County
No. 84433 Bill Swann, Judge

FILED MARCH 20, 2001

No. E2000-01873-COA-R3-CV

Robin Stewart (“Wife”) obtained an *ex parte* order of protection against Keith D. Stewart (“Husband”) based on allegations of physical and threatened physical abuse. Husband made no allegations or complaints of any acts of aggression by Wife. Prior to the hearing on whether to extend the order of protection, Husband filed a Motion to Dismiss and/or Motion for Summary Judgment. Husband argued there had been no determination by a police officer that Wife was not a “primary aggressor” as required by Tenn. Code Ann. § 36-3-601(9). Because this determination had not been made, Husband argued Wife was not a “victim” pursuant to Tenn. Code Ann. § 36-3-602 and, therefore, could not obtain an order of protection. Wife admitted there had been no determination by a police officer that she was not a primary aggressor. Wife argued, however, that such a determination was not necessary before she could obtain an order of protection. The Trial Court denied the motion, stating that Husband’s interpretation of the statute, while a possible interpretation, was not in accord with the legislative intent. An Agreed Order of Protection Without Social Contact which provided that Husband’s agreeing to the order did not constitute a waiver of any rights to appeal the denial of his motion was entered. Husband appeals the Trial Court’s denial of his Motion to Dismiss and/or Motion for Summary Judgment. We affirm.

**Tenn. R. App. P. 3 Appeal As Of Right;
Judgment of the Circuit Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and CHARLES D. SUSANO, JR., J., joined.

W. Andrew Fox, Knoxville, Tennessee, for the Appellant Keith D. Stewart.

Gregory S. McMillan, Knoxville, Tennessee, for the Appellee Robin Stewart.

OPINION

Background

On February 4, 2000, Robin Stewart (“Wife”) obtained an *ex parte* order of protection against Keith D. Stewart (“Husband”) based on allegations of physical and threatened physical abuse. Husband never made any allegations or complaints of any acts of aggression by Wife. The hearing on whether to extend the order of protection was originally set for February 17, 2000, but was continued by agreement of the parties. On February 22, 2000, Husband filed a Motion to Dismiss and/or Motion for Summary Judgment pursuant to Rules 12 and 56 of the Tenn. R. Civ. P. Husband argued in his motion that there had been no determination made by a police officer that Wife was not a “primary aggressor” as required by Tenn. Code Ann. § 36-3-601(9). Husband argued that because this determination had not been made, Wife was not a “victim” under Tenn. Code Ann. § 36-3-602 and, therefore, could not properly obtain an order of protection. Wife admitted there had been no determination made by a police officer that she was not a primary aggressor. Wife claimed, however, that such a determination was not necessary before she could obtain an order of protection.

On March 30, 2000, Husband’s Motion to Dismiss and/or Motion for Summary Judgment was heard by the Trial Court. The Trial Court orally denied the motion, stating that Husband’s interpretation of the statute, while a possible interpretation, was not in accord with the legislative intent. After the Trial Court denied Husband’s motion, the parties agreed to the entry of an Agreed Order of Protection Without Social Contact which was entered by the Trial Court that same day. That Agreed Order provided that Husband’s agreeing to the order did not constitute a waiver of any rights to appeal the denial of his motion. Husband appeals the denial of his Motion to Dismiss and/or Motion for Summary Judgment.

Discussion

The issue presented in this appeal is whether a determination by a law enforcement officer that a petitioner is not a “primary aggressor” is necessary before an order of protection can be issued when: (1) no law enforcement officer has probable cause to believe that two or more persons, those being the petitioner and the respondent, have committed a misdemeanor or felony; and (2) two or more persons, those being the petitioner and the respondent, have not made complaints to the law enforcement officer involving domestic abuse. Because this issue involves a question of law, the standard of review is *de novo* upon the record without a presumption of correctness. *See Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

Victims of domestic abuse may seek protection pursuant to Tenn. Code Ann. § 36-3-601, *et seq.* This statute defines “victim” as follows:

“Victim” means any person who falls within the following categories and who a law enforcement officer has determined is not a primary aggressor under the factors set out in § 36-3-619(c):

- (A) Adults or minors who are current or former spouses;

- (B) Adults or minors who live together or who have lived together;
- (C) Adults or minors who are dating or who have dated or who have or had a sexual relationship, [as used herein “dating” and “dated” do not include fraternization between two (2) individuals in a business or social context];
- (D) Adults or minors related by blood or adoption;
- (E) Adults or minors who are related or were formerly related by marriage; or
- (F) Adult or minor children of a person in a relationship that is described in subdivisions (9)(A)-(E).

Tenn. Code Ann. § 36-3-601(9). Any “victim” who has been subjected to, threatened with, or placed in fear of domestic abuse by an adult who falls into one of the above categories may seek protection by filing a sworn petition alleging such domestic abuse. Tenn. Code Ann. § 36-3-602(a). A standard form petition is set forth in Tenn. Code Ann. § 36-3-604. A trial court may issue an *ex parte* order of protection upon a showing of good cause by the petitioner. “An immediate and present danger of domestic abuse to the petitioner shall constitute good cause” Tenn. Code Ann. § 36-3-605(a). Within fifteen days of service of the *ex parte* order of protection, a hearing shall be conducted at which time the court shall either dissolve the *ex parte* order or, if allegations of domestic abuse are proven by a preponderance of the evidence, extend the order of protection for a definite period of time not to exceed one year. Tenn. Code Ann. § 36-3-605(b).

The statute also provides guidance to police officers when making a determination as to who is a “primary aggressor.” In relevant part, the statute provides:

- (a) If a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or felony, or was committed within or without the presence of the officer, the preferred response of the officer is arrest.
- (b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor or felony, or if two (2) or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor. Arrest is the preferred response only with respect to the primary aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the primary aggressor. If the officer

believes that all parties are equally responsible, the officer shall exercise such officer's best judgment in determining whether to arrest all, any or none of the parties.

(c) To determine who is the primary aggressor, the officer shall consider:

- (1) The history of domestic abuse between the parties;
- (2) The relative severity of the injuries inflicted on each person;
- (3) Evidence from the persons involved in the domestic abuse;
- (4) The likelihood of future injury to each person;
- (5) Whether one (1) of the persons acted in self-defense; and
- (6) Evidence from witnesses of the domestic abuse.

Tenn. Code Ann. § 36-3-619.

Our role in statutory interpretation is to ascertain and effectuate the intent of the legislature. *Kite v. Kite*, 22 S.W.3d 803, 805 (Tenn. 1997). When the language of the statute is unambiguous, the legislative intent shall be derived from the plain and ordinary meaning of the statutory language. *Id.* If the language of the statute is ambiguous and the parties legitimately derive different interpretations, we must look to the entire statutory scheme to ascertain the legislative intent. *Id.*

The legislative intent of the statutes providing protection from domestic abuse is set forth specifically by the legislature in Tenn. Code Ann. § 36-3-618, which provides that:

The purpose of this part is to recognize the seriousness of domestic abuse as a crime and to assure that the law provides a victim of domestic abuse with enhanced protection from domestic abuse. A further purpose of this chapter is to recognize that in the past law enforcement agencies have treated domestic abuse crimes differently than crimes resulting in the same harm but occurring between strangers. Thus, the general assembly intends that the official response to domestic abuse shall stress enforcing the laws to protect the victim and prevent further harm to the victim, and the official response shall communicate the attitude that violent behavior is not excused or tolerated.

In *Kite v. Kite*, 22 S.W.3d 803 (Tenn. 1997), our Supreme Court applied the rules of statutory construction to ascertain the legislative intent of Tenn. Code Ann. § 36-3-605(b). The issue in *Kite* was whether the ten day time period in which a hearing must be conducted after service of an *ex parte* order of protection was jurisdictional or simply intended to limit the duration of the *ex parte* order¹. The respondent argued that when a hearing was not conducted within ten days as required by the statute, the trial court was divested of jurisdiction. *Id.* at 804. The petitioner argued that when a hearing was not conducted within ten days of service, the *ex parte* order expired but the trial court retained jurisdiction and could still issue an order of protection. *Id.* Our Supreme Court, after quoting the legislative intent set forth in Tenn. Code Ann. § 36-3-618, *supra*, concluded that the legislative intent of the statute was to (1) provide enhanced protection to the victims of domestic abuse; (2) promote uniform law enforcement intervention regardless of whether the crime was domestic or committed by strangers; and (3) communicate a position of intolerance to domestic abuse perpetrators. *Id.* at 805. In determining that the ten day time period in which to conduct a hearing was not jurisdictional, the Supreme Court stated that the legislature’s use of the term “enhanced protection” in Tenn. Code Ann § 36-3-618 was significant. The Court then stated that:

The present statute mandates a hearing within ten days of service of an *ex parte* protective order. Tenn. Code Ann. § 36-3-605(b). The ten-day period, therefore, commences upon the service of an *ex parte* protective order on the respondent. If *ex parte* relief is not granted, commencement of the ten-day period will not be triggered. Accordingly, the legislative mandate of a hearing within ten days is applicable only when *ex parte* relief has been issued. We find it illogical that the legislature intended to create a jurisdictional bar to be applied exclusively to those petitioners demonstrating cause, immediate and present danger of abuse, for *ex parte* relief. . . . We shall interpret the legislature’s intention of the ten-day requirement consistent with their stated policy of providing enhanced protection.

Kite, 22 S.W.3d at 805-06.

By its very language, Tenn. Code Ann. § 36-3-619 provides that a police officer shall “try” to determine “who was the primary aggressor” only if one or both of two specific situations occurs: (1) the officer has probable cause to believe that *two* or more persons committed a misdemeanor or felony; or (2) *two* or more persons make complaints to the officer. In the present case, neither of these situations occurred because Wife is the only person who made allegations of domestic abuse. Accordingly, there is no statutorily mandated requirement that a determination as to whether she was the primary aggressor must be made before she may proceed to court. Our conclusion is supported by the recent opinion of the Attorney General of the State of Tennessee. *See*

¹ Tenn. Code Ann. § 36-3-605(b) has since been amended to require a hearing within fifteen days of service of the *ex parte* order of protection.

Opinion No. 01-033, Availability of Protection Orders in Cases of Domestic Abuse, issued on March 12, 2001.

If we were to accept Husband's argument that this determination is necessary, such a requirement would close the courts to victims of domestic abuse who engage in no aggressive conduct themselves and instead seek the intervention of the courts. We think the legislature neither intended nor envisioned the requirement that a determination be made that the victim is not a "primary aggressor" to include situations where there are allegations of only one aggressor. Tenn. Code Ann. § 36-3-618 specifically recognizes that domestic abuse victims historically have been treated differently by law enforcement agencies than victims of crimes occurring between strangers. The legislature's stated intent is to provide victims of domestic abuse with enhanced protection from domestic abuse. Husband's position results not in enhanced protection for domestic abuse victims, but rather in diminished protection. Under Husband's interpretation, a domestic abuse victim who did not or could not strike back would be excluded from the protection of these statutes. Such a result is inconsistent with the clear and stated legislative purpose of these statutes.

The Trial Court's interpretation of these statutes is consistent with the legislature's stated policy of providing enhanced protection to victims of domestic abuse. We find no error by the Trial Court.

As discussed, we do not have before us the situation where a law enforcement officer has probable cause to believe that two or more persons have committed a misdemeanor or felony or where two or more persons have made complaints to the officer. Therefore, we express no opinion whether such a situation requires a determination by a law enforcement official that the individual is not a primary aggressor before that individual may seek relief under Tenn. Code Ann. §36-3-601 *et seq.*

Conclusion

The decision of the Trial Court denying Husband's Motion to Dismiss and/or Motion for Summary Judgment is affirmed. This matter is remanded to the Trial Court for further action as necessary, if any, consistent with this opinion, and for the collection of costs below. Costs of this appeal are taxed to Keith D. Stewart and his surety.

D. MICHAEL SWINEY, JUDGE